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No. 92-1383

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

DONALD F. BOGUE,
Petitioner,

VS.

AMPEX SYSTEMS CORPORATION and ALLIED-SIGNAL INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that a severance plan was subject to ERISA as an employee welfare benefit plan where the plan was established by a parent corporation covering key employees of a wholly-owned subsidiary and provided severance benefits (professional out-placement assistance, severance pay for periods ranging from 18 months to 2 years and continuation of other benefits, including pension benefits, other than car and memberships, for a shorter period) to employees determined to be eligible.*

2. Whether the courts below correctly interpreted the language of the severance plan portion of the 1986 Allied-Signal/E&I Sector Special Compensation Program for Designated Key Executives as granting the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

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* "ERISA" is an acronym for the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461, as amended (1990).

STATEMENT PURSUANT TO RULE 29.1

Respondents are Allied-Signal Inc. and Ampex Systems Corporation (successor-in-interest of Ampex Corporation). Allied-Signal Inc. has no parent corporation; its nonwholly-owned subsidiaries are listed below.** Ampex Systems Corporation has no

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** ACE Insurance Company (Bermuda), Ltd.; ACE Insurance Company, Ltd.; ACE, Limited; AIFCO Filters (Egypt); ASA Investerings (Partnership); Allied-General Nuclear Services (Partnership); Amoricaine de Fonderie Le Chatelet, S.A.; Asia Pacific Resin Corporation; Bendix Atlantic Inflator Company (Partnership); Bendix Electronic Service Corporation de Espaa, S.A.; Bendix Espaa, S.A.; Bendix Europe Services Technique S.A.; Bendix Europe, S.A.; Bendix Group Superannuation Pty., Ltd.; Bendix Mexicana, S.A. de C.V.; Bendix Mintex Proprietary Limited; Bendix Otomotiv Sanayi Ve Ticaret, A.S.; Bendix-Jidosha Kiki Corporation; Bunker Ramo Electronic Data Systems S.A.; CFE Company (Partnership); Cataleasco, Inc.; Central Nice, Ltd.; Chico Corporation; Coalition Remedial Efforts, Inc.; Compania Industrial de Fluorita, S.A.; Compania Metalurgica de Parral, S.A.; Coopers Filters, Ltd.; D.B.A. S.I.B.E., SNC (Partnership); Delaney Gallay Dynamics, Ltd.; Don Brake Lenings Pty.; Don Eastern Sdn Bhd; Doosan Electro-Materials Co., Ltd.; Dynamic Turbocharger Services Pty., Ltd. Queensland; Dynamic Turbocharger Services Pty., Ltd. Victoria; FDA East Glass Fiber Co.; Ferranti plc; Ferranti-Bendix Power Generation Limited; FIAAM Filter S.p.A.; Fram Canada; Fram Espaa S.A.; Fram Europe A.B.; Fram Europe B.V.; Fram Europe Limited; Fram Europe (Marketing) A.B.; Fram Filter, S.p.A.; France Automobile Service, S.A.; Garrett Comtronics Licensing Corp.; Garrett Turbo India, Ltd.; Globe Auto Electricals, Ltd.; Greyco, S.A.; Heavy Vehicles Systems Group Limited; HBH Company (Partnership); Hankuk Brake Industrial Co., Ltd.; Industrial Turbines International Inc.; International Robomation Intelligence Inc.; International Technigroup Inc.; International Turbine Engine Corporation; Investech; ITI-GISA; Japan Gasoline Co., Inc.; Jidosha Kiki Co., Ltd.; JSR Allied Corporation; Kalyani Brakes Limited; Kanto Seiatsu Kogyo Co., Ltd.; Katalistiks International Inc.; La Industrial Plastica y Metalurgica, S.A.; Leaseway AllServices, Inc.; Light Helicopter Turbine Engine Company (Partnership); Lucas Air-Equipment S.A.; Lucky Allied Plastics Corporation; Manbritt Industries, Inc.; Morristown Airport Customs Association (Partnership); Morton Bendix Company (Partnership); NGL (Singapore) Pty., Ltd.; Niigata Technos Co., Ltd.;

subsidiaries that are not wholly-owned; its parent corporation is Ampex Incorporated.

Nikki-Universal Co., Ltd.; Nippon Amorphous Metals Co., Ltd.; Nirlon Synthetic Fibres and Chemicals, Ltd.; Nitto Boseki Company Ltd.; Nittobo-Norplex/Oak Co., Ltd.; Normalair Garrett (Holdings) Ltd.; Normalair Garrett Manufacturing Pty., Ltd.; Normalair Garrett Pty., Ltd.; Normalair Garrett, Ltd.; Norplex Oak India Limited; Oak-Mitsui (Partnership); Oak-Mitsui Inc.; Paxon Polymer Company (Limited Partnership); Prestolite of India Ltd.; Propelentes Mexicanos, S.A.; Quimobasicos, S.A.; Rovert (1987), Ltd.; SAPDCO Bendix (Saudi Arabia) Limited; Seo Han-Bendix Company Limited; Shanghai UOP-UCC Molecular Sieve Co., Ltd.; Sifra Industrie, S.A.; Societe Anonyme des Usines Chausson; Societe d'Etudes et de Constructions AeroNavales [SECAN]; Stop Iberica, S.A.; Synektron Corporation; TAC (Aircraft Controls), Ltd.; Technofon; Technos Co., Ltd.; TENSA, S.A.; Transitions Two; Transpar Iberica, S.A.; Turbodina S.A.I.Y.C.; UMP Limited; Union Showa K.K.; Unitrode; Universal Assets Inc.; Universal Oil Products Company; UOP (Partnership); UOP B.V.; UOV Canada Inc.; UOP Charitable Foundation, Inc.; UOP Dubai Limited; UOP Equetec Services, Inc.; UOP France, S.A.; UOP GmbH; UOP Iberia, S.A.; UOP Inc.; UOP International Services Limited; UOP International Technology Limited; UOP K.K.; UOP Limited; UOP Management Services, Inc.; UOP Management Services (Saudi Arabia) Limited; UOP M.S. S.p.A.; UOP N.V.; UOP Pacific Ltd.; UOP Process International, Inc.; UOP Processos Industrials do Brasil Ltda.; UOP S.p.A.; USHA Amorphous Metals Ltd.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Donald F. Bogue, plaintiff below, seeks severance benefits under a severance plan established by respondent Allied-Signal Inc. as part of a special compensation program covering key employees of its wholly-owned subsidiary respondent Ampex Corporation. The program was established at a time when Allied Signal proposed to sell Ampex.[1] The severance plan provided for severance benefits if "[n]either Allied-Signal nor the Buyer offers

[1] Besides the severance plan, the program contained a "stay bonus" of $100,000 conditioned on the employee's remaining with Ampex for 90 days after the sale, and a "sale price incentive" payment based on the purchase price to Allied-Signal upon the sale of Ampex. Pet.Appx. at 35a-40a. Only the severance plan is in dispute here.

you 'substantially equivalent' employment and your employment is terminated." Pet.Appx. at 39a. Severance benefits were to include 18 months severance pay, continuation of other benefits, including pension benefits (other than car and memberships) unless provided by a subsequent employer, and professional outplacement assistance. *Ibid.* The plan further provided:

> The determination of "Substantially equivalent" position will be made by Allied-Signal upon consideration of whether the new position:
>
> (i) has compensation and benefits with a value not less than 90% of your current compensation and benefits * * *;
>
> (ii) is located not more than 50 miles from your current work location; and
>
> (iii) *has responsibilities similar to those of your current position.*

Pet. Appx. at 40a (emphasis added).

In May 1987, Allied-Signal sold Ampex Corporation. Pursuant to the sale agreement, Ampex assumed liability for the plan; Allied-Signal remained plan administrator. Pet. Appx. at 3a.

Petitioner's "current" position when the plan was adopted was Vice President of Ampex's Audio-Video Systems Division. Pet.Appx. at 2a.

After the sale of Ampex, petitioner was offered the position of Vice President of Marketing, Sales and Service of Ampex. Pet.Appx. at 3a. Petitioner accepted the new position, but soon resigned. Petitioner then applied to Allied-Signal for severance benefits, claiming that the new position he had been offered was not "substantially equivalent" to the position he had held prior to the sale. *Ibid.* Allied-Signal determined that the two positions were "substantially equivalent", and rejected petitioner's claim. Petitioner filed suit in state court alleging various common law causes of action. The case was removed to the federal district court on the ground that the action was governed by ERISA. The district court denied a motion for remand. Pet.Appx. at 32a-33a.

Petitioner filed an amended complaint specifically seeking severance benefits under ERISA. Pet.Appx. at 18a. Respondents moved for summary judgment on the ground that the plan administrator's eligibility determination was not an abuse of discretion. The district court granted the motion (Pet. Appx. at 16a) and entered judgment for respondents. Petitioner's motion for reconsideration was denied. Appellant's Excerpt of Record (filed in the Ninth Circuit), p. 120. The court of appeals, in an opinion by The Honorable John Minor Wisdom, United States Circuit Judge for the Fifth Circuit, sitting by designation, affirmed. 976 F.2d 1319, 1327.[2]

REASONS WHY THE WRIT SHOULD BE DENIED

Both the trial court and the court of appeals correctly held petitioner's claims subject to ERISA because they arose under a severance program that required an ongoing administrative scheme. 976 F.2d at 1322-24. Though petitioner urges this Court to use this case to "establish a rule" (Pet. at 8) that draws a line between employee benefit plans and non-ERISA compensation programs on the basis of the employer's purpose, that issue was not raised in the Ninth Circuit.[3] It is undisputed that the question

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[2] Because petitioner failed to seek an interlocutory appeal of the order denying petitioner's motion to remand, his request that the Court review whether ERISA provided a basis for *removal* of his state court action to the district court and his argument concerning preemption are not preserved except as to the question whether the district court would have had jurisdiction had the case originally been filed in that court. *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972). The issue is further limited to whether the district court had jurisdiction over petitioner's *amended* complaint, by which petitioner specifically invoked ERISA. *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 545-547 (5th Cir. 1990).

[3] Petitioner erroneously contends that he raised this issue in the Ninth Circuit by arguing that the severance plan was not established or maintained by his employer, or anyone acting on behalf of the employer. Pet. at 11, n.4. But whether a plan was "established or maintained" by an "employer" is a completely different question than whether particular benefits are covered by ERISA. Moreover, under the pleadings of the

of coverage under ERISA arose only as to the *severance* plan that was part of the "Allied-Signal/E&I Sector Special Compensation Program for Key Executives", not the bonuses offered under separate parts of the program. Pet.Appx. at 3a, n.3. Petitioner also acknowledged below that "severance benefits are an 'employee welfare benefit' which ERISA may regulate", and argued that the test for ERISA application is whether the program necessitates "ongoing administration." See Appellant's Opening Brief filed by petitioner in the Ninth Circuit ("AOB"), pp. 11-12, citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Both the district court and the court of appeals applied the *Fort Halifax* test to the Allied-Signal plan and found that an ongoing administrative scheme was required, because a determination of eligibility for benefits was required each time a participant might leave his employment. Pet.Appx. at 5a-7a. Petitioner's assertion that the Ninth Circuit has "split with the Fifth Circuit on this issue" (Pet. at 8) is contradicted by the Ninth Circuit's decision and is totally without merit.

Likewise, no reason exists for this Court to review or analyze the particular terms of the severance plan, which both the district court and the court of appeals interpreted as granting discretionary authority to the plan administrator to construe plan terms and determine eligibility for benefits. Both courts below carefully analyzed the particular terms of the plan in the light of this Court's holding in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Contrary to the petition, the decision below does not conflict with any other circuit court decision and is unlikely to affect other litigants. Moreover, the decisions of the courts below are correct.

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case, there was no genuine issue whether the severance plan was established or maintained by petitioner's employer. See p. 9, n. 7, post.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE SEVERANCE PLAN WAS COVERED BY ERISA.

A. The Requirement of an Administrative Scheme.

The court of appeals properly rejected petitioner's argument that the Allied-Signal severance benefit plan did not require an administrative scheme:

> Although the program, like the plans in *Fort Halifax* and *Wells*, was triggered by a single event, that event would occur more than once, at a different time for each employee. * * * Although its application was uncertain, its term was short, and the number of its participants was small, the program's administration required a case-by-case, discretionary application of its terms. * * *; there was no way to administer the program without an administrative scheme. We hold that Allied-Signal was obligated to apply enough ongoing, particularized, administrative, discretionary analysis to make the program in this case a "plan."

976 F.2d at 1323.

Petitioner, claiming that the Ninth Circuit has "split with the Fifth Circuit on this issue" (Pet. at 8), cites *Wells v. General Motors Corp.*,[4] and *Fontenot v. NL Industries, Inc.*,[5] in which the Fifth Circuit analyzed quite different programs that did not involve ongoing administrative schemes. Petitioner's claim that the Ninth Circuit is in conflict with the Fifth Circuit should be compared with the Ninth Circuit's opinion, which makes plain that that court is not in disagreement with the Fifth Circuit:

> In finding that the program is susceptible to ERISA preemption * * * we choose to follow the approach of the Third Circuit in considering a severance plan similar to the program in this case, *and a more recent Fifth Circuit case that narrows the broader implications of Wells.*
>
> * * *

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[4] *Wells v. General Motors Corp.*, 881 F. 2d 166 (5th Cir. 1989).

[5] *Fontenot v. NL Industries, Inc.*, 953 F.2d 960 (5th Cir. 1992).

> The reasoning of a recent Fifth Circuit case, *Fontenot v. NL Indus., Inc.*, * * * looks to whether the plan in question " 'require[s] an administrative scheme' because 'the circumstances of each employee's termination [have to be] analyzed in light of [certain] criteria.' " *We adopt this approach, which places the Allied-Signal program on the ERISA side of that fence.*

976 F.2d at 1322-1323 (footnotes omitted, emphasis added).

Petitioner's related contention that the Fifth Circuit's decision in *Fontenot* conflicts with the Third Circuit's decision in *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989) (Pet. at 9) is likewise belied by the Fifth Circuit's opinion in *Fontenot*:

> The decision in *Pane v. RCA Corp.*, 667 F.Supp. 168 (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3d Cir. 1989), relied upon [by] Fontenot in support of his position, does not prescribe a different conclusion. There, the severance agreements "required an administrative scheme," 868 F.2d at 635, because "the circumstances of each employee's termination [had to be] analyzed in light of [certain] criteria." 667 F.Supp. at 170-171. In contrast, NL Industries' severance plan requires no administrative scheme because those employees included in the plan were to receive benefits upon termination regardless of the reason for termination.

Fontenot, supra, 953 F.2d at 962-963.

In the present case, unlike *Fontenot, Wells* and *Fort Halifax*, employees covered by the Allied Signal plan were *not* to receive benefits regardless of the circumstances. The circumstances of each employee's termination had to be analyzed in light of criteria. Compare *Fontenot*, supra, 953 F.2d at 962-963. As the Ninth Circuit pointed out: "[T]here was no way to administer the program without an administrative scheme." 976 F.2d at 1323. This holding is not inconsistent with any other decision.

B. The Employer's Purpose.

Petitioner further claims to find a conflict among the decisions of the Fourth, Fifth, Ninth and Eleventh Circuits in the holding that the Allied-Signal plan involved a type of benefit covered by

ERISA. Pet. at 10. Aside from the fact that petitioner did not raise this issue in the court of appeal (see note 3, ante), none of the cases cited involve the issue whether severance plans are covered by ERISA.[6]

For example, in *Murphy v. Inexco Oil Co.*, 611 F.2d 570 (5th Cir. 1980), cited at page 10 of the petition, the Fifth Circuit held that a bonus plan that provided extra compensation *during employment* (through fractional shares in an oil and gas royalty) was not covered by ERISA. The court pointed out that the participation shares in the royalty were transferred to the employees during their active employment. The fact that the royalty payments might continue after an employee's retirement or death did not, the court held, convert them to death or retirement benefits, but was due to the inherent characteristic of royalty interests, namely, that they were paid on gas or oil production whenever realized. Nothing in *Murphy* suggests that a plan for *severance* benefits is not covered by ERISA because it may constitute part of the incentive for the employees' services. Post-employment benefits are almost invariably offered or bargained for as part of the incentive for current services.

In arguing that the Allied-Signal severance plan is not within the contemplation of ERISA, petitioner cites cases and draws conclusions pertinent to ERISA "employee *pension* benefit plans," which are subject to vastly different rules than "employee *welfare* benefit plans." For example, in *Fraver v. North Carolina Farm Bureau Mut. Ins. Co.*, 801 F.2d 675 (4th Cir. 1986), the Fourth Circuit held that an insurance agent's employment contract did not create an ERISA *pension* plan because the post-termination benefits provided thereunder were not retirement income. Petitioner concludes from these cases that:

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[6] It is beyond dispute that severance plans are covered by ERISA as "employee welfare benefit plans." See, e.g., *Massachusetts v. Morash*, 490 U.S. 107, 116 (1989); *Fort Halifax Packing Co. v. Coyne*, supra, 482 U.S. 1, 7 (1986); *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1144-1146 (4th Cir. 1985), affirmed, 477 U.S. 901 (1986); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 324-326 (2d Cir. 1985), affirmed, 477 U.S. 901 (1986).

> If the primary purpose is to provide *post*employment benefits, it is an ERISA plan. If the primary purpose is to provide an incentive for current services, it is not an ERISA plan, even if it incidentally provides for post-employment benefits.

Pet. at 11 (emphasis added).

The folly of adopting this distinction for welfare plans is clear, in light of the statute, which includes benefits that are plainly incentives for current services:

> (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, * * * or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds * * *.

29 U.S.C. § 1002(1).

Petitioner creates further confusion by framing the issue as one of ERISA coverage with respect to the *entire* Allied-Signal program, including the "stay bonus" and "sale price incentive." Pet. at 11. However, only the Allied Signal *severance* plan is at issue in this case. Pet. Appx. at 3a.

C. The "Employer" Issue.

The petition is also in error in asserting that the case presents an "important ERISA definitional issue of what constitutes an 'employer' under the statute." Pet. at 12. The court of appeals held:

> When a corporation establishes an employee benefit plan for the employees of its wholly owned subsidiary and retains the duty to administer that plan, and when the subsidiary bears the financial burden of funding it, the plan is "established or maintained by an employer" and is accordingly controlled by ERISA.

976 F.2d at 1323-24.

Petitioner does not even claim there is a conflict in the circuits on this point, and there is not. Moreover, the Ninth Circuit holding is correct. Were the rule otherwise, it would yield the absurd result that an employer could avoid ERISA by structuring

itself as a holding company that provides benefits for the employees of its operating subsidiaries.[7]

II. THE LOWER COURTS' HOLDINGS THAT THE PLAN ADMINISTRATOR HAD DISCRETIONARY AUTHORITY TO CONSTRUE PLAN TERMS AND DETERMINE ELIGIBILITY FOR BENEFITS TURN UPON AN ANALYSIS OF THE PARTICULAR PLAN TERMS AND RAISE NO IMPORTANT QUESTION FOR SETTLEMENT BY THIS COURT.

Both the district court and the court of appeals construed the plan terms as giving the administrator discretionary authority to determine eligibility for benefits and to interpret the plan. Accordingly, under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the administrator's decision was reviewed under the abuse of discretion standard. The court of appeals pointed out:

> Employees who lose promised benefits should not lose the additional benefit of judicial review because their employer reserved discretionary power to itself without making that reservation clear. But when a plan includes even one important discretionary element, and the power to apply that element is unambiguously retained by its administrator, we may not second-guess the exercise of that discretion. The program's beneficiaries were on notice that Allied-Signal had such discretion over determining whether their responsibilities were substantially reduced; we can reverse the exercise of such discretion only when it has been abused.

976 F.2d at 1325.[8]

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[7] Contrary to the petition, the present case presents no genuine issue whether the plan was established by petitioner's "employer." Petitioner's complaint in the district court alleged that both Ampex and Allied-Signal were petitioner's "employers" within the meaning of 29 U.S.C. § 1002(5). Appellant's Excerpt of Record (filed in the Ninth Circuit) (hereinafter "AER"), p. 19, ¶ 10. That allegation was admitted by both defendants. AER, p. 31, ¶ 7 (Ampex); AER, p. 37, ¶ 7 (Allied-Signal).

[8] On this point, Appendix A of the Petition misquotes the court of appeals' decision. Appendix A quotes the opinion as saying:

Petitioner now erroneously contends that the Ninth Circuit is in conflict with other circuits *in its interpretation of the terms* of the Allied-Signal plan.

But the petition's elaborate attempt to construct a "conflict" among the circuits on this issue (Pet. at 14-20) is to no avail. Although petitioner cites a large number of cases, each decision is made against the backdrop of a particular set of plan provisions. The rulings indicate no more than that decisions interpreting benefit plans turn upon their own facts. It is inevitable, in the four years following *Bruch*, that parties will argue that particular plan language is either similar enough to or too dissimilar from plan language construed in other cases to achieve a particular result. See, e.g., *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 637 (5th Cir. 1992). As the Fifth Circuit pointed out in *Wildbur*, a court must read a plan "as a whole" (974 F.2d at 637) to determine if, in its judgment, it satisfies the *Firestone* criteria. Given the variety of plans and differences in plan language, there are and will continue to be cases on both sides of the line. This does not show a conflict among the circuits. Nor does the fact that courts generally must read the plans under the *Firestone* criteria suggest that this Court must review each such reading.

Petitioner purports to find the *Bogue* decision in conflict with the decisions of no less than seven other circuits. Pet. at 14. For example, the petition asserts that the Sixth Circuit is "in clear conflict" with *Bogue* (Pet. at 16), citing *Johnson v. Eaton Corp.*, 970 F.2d 1569 (6th Cir. 1992) and *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546 (6th Cir. 1989). But in *Johnson*, the Sixth Circuit found that the particular plan it was considering conferred

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> But when a plan includes even one element is unambiguously retained by its administrator, we may not second-guess the exercise of that discretion.

Pet. Appx at 10a. The court of appeals' decision actually reads:

> But when a plan includes even one important discretionary element, and the power to apply that element is unambiguously retained by its administrator, we may not second-guess the exercise of that discretion.

976 F.2d at 1325.

discretion, so that a deferential standard of review was proper. That holding clearly does not conflict with *Bogue*. And in the *Brown* case, unlike *Bogue*, there was no basis in the plan for any judgment or discretion in determining eligibility for benefits. The Sixth Circuit pointed out that under the plan involved in *Brown*, once the employer made a decision not to recall an employee who had been laid off, eligibility for benefits was "automatic." 876 F.2d at 550. Thus, the issue in *Brown* was reduced to whether plaintiffs were entitled to benefits under a 1984 plan, before it was amended in 1986, or a later version. The finding that the administrator had no discretion on that issue is not in conflict with *Bogue*.

There is also no conflict between *Bogue* and Second Circuit decisions. In *Masella v. Blue Cross & Blue Shield of Conn.*, 936 F.2d 98 (2d Cir. 1991) (Pet. at 18), the claim that the plan granted discretion to Blue Cross was based on the argument that since Blue Cross had had discretion to establish the terms of the plan in the first instance, it had discretion to interpret the terms later. 936 F.2d at 103. The Second Circuit's rejection of that argument is in no way inconsistent with the court of appeal's decision in *Bogue*.

The petition erroneously asserts that the Seventh Circuit "directly conflicts with" *Bogue* (Pet. at 16), citing *Petrilli v. Drechsel*, 910 F.2d 1441 (7th Cir. 1990) and *Ziaee v. Vest*, 916 F.2d 1204 (7th Cir. 1990). However, in *Petrilli* the Seventh Circuit, applying the maxim "expressio unius est exclusio alterius," pointed out that the pension plan in question

> explicitly grants plan administrators the discretion to determine whether the employee has been offered "suitable long-term employment," but does not similarly provide for discretionary interpretation of the word "layoff".

910 F.2d at 1447. In *Ziaee*, the Seventh Circuit found that the provision "[t]he Trustees shall determine, in view of the current circumstances and needs of the Plan, the [allocation of investments]" *did* grant discretionary authority over investment strategies, but that the grant did not extend to the computation of benefits. 916 F.2d at 1206-1207. Neither of these cases conflicts with the court of appeals' decision here. Specifically, Allied-

Signal clearly had authority to determine the "substantially equivalent position" issue, which is the only issue Allied-Signal determined.

Nor is there conflict with the Fifth Circuit. *Wildbur v. Arco Chemical Co.*, 974 F.2d 631 (5th Cir. 1992) held that the district court had erred in applying a de novo standard of review, based on a finding that the plan terms granted discretionary authority to determine benefit eligibility. While the plan language in *Wildbur* is different than in this case, there is manifestly no conflict. In *Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554 (5th Cir. 1990), the Fifth Circuit held that the following plan provision merely allocated authority between the plan administrator and the plan fiduciary:

> * * * such insurance company (and *not* the Plan Administrator) shall be the "Named Fiduciary" of the Plan with regard to any review and *final decision on a claim for benefits* under such policy.

907 F.2d at 559, n.6 (emphasis in original). Here, however, the Allied-Signal plan did not allocate authority between Allied-Signal and anyone else, but provided that Allied-Signal would make a "determination" of whether the position was "substantially equivalent" based on "consideration of" a nonquantifiable and therefore necessarily judgmental factor ("similar responsibilities").[9]

The other circuit court cases[10] which petitioner contends are in "conflict" with the Ninth Circuit's decision did not even discuss any specific language: *Allen v. Adage, Inc.*, 967 F.2d 695, 698 (1st

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[9] The Allied-Signal plan did not specify the weight to be given any of the three factors to be considered in determining "substantially equivalent position" (compensation, location, and similarity of responsibilities), nor did it specify a standard for determining the third factor. Those matters were left to Allied-Signal's judgment and discretion.

[10] Petitioner also cites a district court case, *Clark v. Bank of New York*, 801 F.Supp. 1182 (S.D.N.Y. 1992), which "decline[d] to follow" the *district* court's opinion in the present case. The district court in *Clark* did not cite *any* circuit court decision in reaching its conclusion.

Cir. 1992) ("nothing in the Plan indicates that another approach is to be used"); *Bellino v. Schlumberger Technologies, Inc.*, 944 F.2d 26, 29 (1st Cir. 1991) (defendant "points to no language in the Plan giving it the 'discretionary authority' required for that standard"); *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1077-79 (4th Cir. 1989) (no plan language quoted, but the case involved objective eligibility standards (age, service and employer assent)); *Schultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676, 678 (5th Cir. 1989) ("[n]either party has pointed to any provision in the Plan which gives the administrator discretionary authority to determine benefit eligibility or to construe the plan terms").[11]

The petition is also misleading in asserting conflicts involving other circuits on this issue. For example, the petition cites *Luby v. Teamsters Health, Welfare & Pen. Tr. Funds*, 944 F.2d 1176 (3d Cir. 1991), as holding that discretionary powers may be implied, if not granted expressly, and asserts that the Third Circuit is thus in conflict with the Fourth Circuit. Pet. at 19. *Luby*, however, relies expressly on a *Fourth* Circuit decision. 944 F.2d at 1180. Moreover, the *Luby* court makes clear that its reference to implied powers means no more than that no "magic words", such as "discretion is granted", are necessary.

The theory that "magic words" are required for a grant of discretion was also rejected by the very cases petitioner cites as requiring an "express" grant of discretion. See, e.g., *Wildbur*, supra, 974 F.2d at 637 (5th Cir. 1992); *Johnson*, supra, 970 F.2d at 1572, n.2 (6th Cir. 1992). The Fifth Circuit explained in *Wildbur*:

> We reject plaintiffs' argument that a *de novo* standard must apply because of the absence of the word "discretion" * * *. We agree with the District of Columbia Circuit that

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[11] *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989), cited as showing a conflict with the Eighth Circuit, did not even involve court review of a plan administrator's decision regarding benefits. *Baxter* was an interpleader action involving a claim of subrogation rights against an insurer whose policy also covered the beneficiary. The trustees had been granted no authority to make determinations under the plan's subrogation provision.

> "[t]he Court in *Firestone* surely did not suggest that 'discretionary authority' hinges on incantation of the word 'discretion' or any other 'magic word.' Rather, the Supreme Court directed lower courts to focus on the breadth of the administrators' power—their 'authority to determine eligibility for benefits or to construe the terms of the plan' * * *." *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992). *Accord, De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187 (4th Cir. 1989) ("There are obviously no magic words required to trigger the application of one or another standard of judicial review . . .").

974 F.2d at 637.

Petitioner contends that "no case has gone as far as *Bogue*" in finding a grant of discretionary authority. Pet. at 14. A review of cases not cited by petitioner, from the very circuits that petitioner contends are "in conflict" with *Bogue*, shows that *Bogue* is in the mainstream on the issue of plan interpretation. See, for example, *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541, 544-545 (8th Cir. 1989) (plan found to grant discretionary authority based on statement in severance pay manual that "[t]he following material attempts to interpret the more usual situations that may arise * * *"[12] (*id.* at 546)); *Curtis v. Noel*, 877 F.2d 159, 161 (1st Cir. 1989) (grant of discretionary authority found in provisions that the administrator "shall determine 'which Employees are eligible to participate in the Plan,' and shall 'provide all parties dealing with the Plan an interpretation of Plan provisions on request' "); *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 983-984 (6th Cir. 1991) (discretionary authority found in provision permitting company to decide whether applicant is "disabled", using medical evidence "satisfactory" to the company); *Bali v. Blue Cross and Blue Shield Ass'n*, 873 F.2d 1043, 1047 (7th Cir. 1989) (same).

Cases involving nonquantifiable and thus inherently judgmental plan terms comparable to the Allied-Signal plan are also in harmony with Ninth Circuit's decision: *Finley v. Special Agents Mut. Ben. Ass'n, Inc.*, 957 F.2d 617, 618-619 (8th Cir. 1992)

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[12] Plaintiff asserted in the Ninth Circuit that this language in *Lakey* is an *express* grant of discretion. AOB at 24.

(discretion authorized by grant of power to determine if employee death resulted from "confrontational situation" and if employee "was engaged in an attempt" to protect life while on official duty); *Anderson v. Blue Cross/Blue Shield of Alabama*, 907 F.2d 1072, 1076 (11th Cir. 1990) (authority to determine which services and supplies are medically necessary and to determine reasonable and customary physicians' fees); *Newell v. Prudential Ins. Co. of America*, 725 F.Supp. 1233, 1241 (N.D.Ga. 1989), affirmed in part, 904 F.2d 644, 650 (11th Cir. 1990) (authority to determine whether hospital services and supplies fell within plan conditions).

The court of appeals was explicit in *Bogue that*

> We do not want to encourage an employer to insulate himself from effective appellate review through the abuse of vague phrases that fail to make clear to the employees that the employer will have the final determination of benefit decisions. Employees who lose promised benefits should not lose the additional benefit of judicial review because their employer reserved discretionary power to itself without making that reservation clear.

976 F.2d at 1325. The court, however, viewed the Allied-Signal plan as "unambiguously" reserving discretionary power. *Ibid.* The court's holding is unremarkable and is correct.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

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